IN THE

Supreme Court of the United States

October Term, 1976

No. 76-6061

CHARLES D. ERB,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: October 28, 1976

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Citations

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The Petitioner, Charles D. Erb, prays that a Writ of Certiorari issue to review the judgment and opinion entered on October 1, 1976 by the United States Court of Appeals for the Second Circuit in the proceeding entitled *United States of America,* Plaintiff-Appellee, v. *Charles D. Erb* and *Franklin S. DeBoer,* Defendants-Appellants, Docket No. 76-1143.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit appears at Appendix page 1a. The opinion of the District Court for the Southern District of New York appears at Appendix page 1b.

Jurisdiction

The judgment of the Court of Appeals was entered on October 1, 1976. The jurisdiction of this Court is invoked under Title 18, United States Code, Section 1254 (1).

Question Presented

Whether a prosecutor's *deliberate* suppression of facts which would be material and favorable to the defense requires a new trial where it cannot be shown that access to the facts would have created a reasonable doubt in the minds of the jury?

Constitutional Provision Involved

Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

Petitioner Erb, a partner in a New York brokerage firm, was convicted by a jury on June 2, 1975, in the United

States District Court for the Southern District of New York, on charges that he caused false statements to be made in registration statements filed with the Securities and Exchange Commission, in letters and in prospectuses to the effect that his alleged nominee Scott Skillern, and not Petitioner himself, was the owner of certain shares of X Print Corporation, a company which then was contemplating a public offering of its stock through Petitioner's firm.* Although Petitioner's prior history was exemplary and he was not shown to have attempted to defraud anyone out of a nickel, he was sentenced to eighteen months in prison.

The principal evidence against Petitioner was given by George Van Aken, an unindicted co-conspirator who testified that Petitioner had said he would use Skillern as a nominee, and Skillern himself, who testified that Erb was the actual owner of the shares in question. Petitioner did not take the stand.

Since the credibility of both Van Aken and Skillern was highly suspect,** the Government took great pains to prove that Petitioner was aware of rules of the National Association of Securities Dealers which limit compensation to underwriters, and so had a motive to hide ownership of the shares. Thus X Print's attorney Paul DeCoster testified

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* X Print was engaged in the manufacture of color reproduction equipment. Unlike the typical securities fraud or "manipulation" case, there was no suggestion in this case that X Print was anything other than a legitimate company whose financial condititon was exactly as represented in its prospectus.

** Van Aken was an admitted liar, awaiting sentence on other charges, and Skillern was acknowledged by the Government during the trial to be a witness whose "credibility is perhaps the worst of anyone yet to appear" (T. 216-217; 264; 502-51). References prefixed "T" and "App." are to the trial transcript filed with the Court of Appeals for the Second Circuit and to Petitioner's Appendix filed with that Court, respectively.

to a meeting on May 12th, 1969 at the Manhattan office of one Conrad Schmitt, at which DeCoster gave advice that ownership by Van Aken or Petitioner of X Print shares would violate the excess compensation rules. DeCoster specifically identified Schmitt, X Print's President Earl Deimund, and Van Aken as being at the meeting and testified to the May 12th date from a diary entry (T. 545-46). As to Petitioner, DeCoster said that "I believe that Mr. Erb was present, although I cannot swear to it" (T. 545).

Earl Deimund, obviously testifying about the same meeting in Schmitt's office, was *never* asked by the prosecutor to state precisely who was at the meeting, and merely testified:

> "So we held a meeting in Mr. Schmitt's office and Mr. DeCoster and myself told Mr. Schmitt and Mr. Van Aken, Mr. Erb, that the original concept of them owning stock would not be feasible and that if we were to do anything with Baerwald and DeBoer [Petitioner's firm] they could not own any of the stock themselves.
>
> Q. [By the prosecutor] What if anything did Mr. Van Aken and Mr. Erb say about that?
>
> Mr. Koenig [Petitioner's trial counsel] I object to the dual question.
>
> The Court. Yes, sustained.
>
> Q. All right. What if anything did Mr. Van Aken say about that? A. To the best of my recollection, Mr. Van Aken [said] . . . 'C'est la vie' " (T 412-13)

The prosecutor did not pursue with any separate question as to what Petitioner said. But later, in arguing to the Court as to how it should handle the equivocal testimony of DeCoster on the same subject, the prosecutor made reference to Deimund, stating that he "also testified about this meeting *and put Mr. Erb there*". (T 551).

Finally, in his summation, the prosecutor made the following argument in response to Petitioner Erb's counsel's contention as to the paucity of credible evidence that appellant Erb was at this key meeting:

> "[Mr. Koenig] also said that Mr. DeCoster couldn't be sure that Mr. Erb was there at that one meeting when they told him they couldn't own the stock. And that's what Mr. DeCoster told you, 'I think he was there, I believe he was there, but I am not quite certain of it.'
>
> And then Mr. Koenig would suggest to you that because Mr. DeCoster said that and because Mr. Van Aken said Erb was there, obviously Erb wasn't there. I suggest to you, ladies and gentlemen, that Mr. Koenig forgot something. *He forgot Earl Deimund, who was there. Three people, ladies and gentlemen. Three people testified. Two were sure he was there* and the other one, 'I'm pretty sure but I can't be positive he was there.' Sounds like he was there, contrary to the 'Obviously he wasn't there' " (T 1012-13; emphasis added).

Petitioner submitted a new trial motion containing an affidavit by Earl Deimund swearing that he had always believed it unlikely that petitioner was at the meeting and that he explicitly told two different Government lawyers of this reservation. He went on to swear:

> "Indeed, on the day I testified at the trial, [the prosecutor] again asked me whether I did not clearly recall that Mr. Erb was at the meeting and I again told him what I had previously said. Then once more in the Courthouse, just before I testified, [the prosecutor] asked the same question, and I gave the same answer" (App. 74-75).

The prosecutors submitted affidavits denying that any such conversations had ever taken place (App. 78).

Petitioner sought a hearing on the new trial motion, making the obvious point that if Deimund's affidavit was truthful, then the prosecutor must have *deliberately* withheld from the Court and defense counsel the fact that his own witness had given crucial testimony which was plainly inconsistent with information he had consistently given to the prosecutor. In both courts below, Petitioner relied on repeated decisions of the Court of Appeals for the Second Circuit that *deliberate* Government suppression of facts which are "merely material or favorable" to the defense requires a new trial. *E.g., United States* v. *Morell* 524 F.2d 550, 553 (2d Cir. 1975); *United States* v. *Hilton,* 521 F.2d 164, 166 (2d Cir. 1975); *United States* v. *Stofsky,* 527 F.2d 237, 243 (2d Cir. 1975); *United States* v. *Miranda,* 526 F.2d 1319 (2d Cir. 1975). Evidence of Deimund's statements to the prosecutor, seriously undercutting the government's contention that Petitioner attended the key meeting, would plainly have met this standard. Both the District Court and the Court of Appeals, however, applied a different standard to this case, finding that Deimund's statement "could [not] have been developed so as to have avoided a conviction" (8a; 6b-7b).** In upholding the District Court's

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* Although both Courts below stressed the fact that the government was not required to prove a motive for the alleged false statements (8a; 7b), nevertheless the government emphasized proof of motive throughout the trial (E.g., T. 13, 14, 25, 641-670, 884, 886, 898, 901).

** Both Courts also held that the information presented on Petitioner's new trial motion was not "newly discovered", since Petitioner must have known whether he was at the meeting or not, and could have either taken the stand to deny it or cross-examined Deimund closely as to his recollection. But Petitioner's new trial motion was premised on deliberate Government suppression of the fact that Deimund was giving testimony different from what he had repeatedly told the prosecutor, and not on any theory that Petitioner's absence from the meeting was something "newly discovered".

refusal to grant Petitioner a hearing, the Court of Appeals relied expressly upon the recent decision of this Court in *United States* v. *Agurs,* 44 U.S.L.W. 5013 (U.S. June 24, 1976).

Reasons for Granting the Writ

In *United States* v. *Agurs, supra,* this Court held that a prosecutor's failure to supply a defendant in a murder trial with prior criminal record information showing the victim's propensity for violence did not deprive the defendant of a fair trial under *Brady* v. *Maryland,* 373 U.S. 83 (1963), since the omitted information did not create a reasonable doubt as to the defendant's guilt. Although the majority opinion stated in passing that the deliberateness of the prosecutor's conduct should not affect the standard to be applied, that was plainly dictum, since the prosecutor's conduct in *Agurs* was understood to be entirely blameless. See the dissenting opinion of Mr. Justice Marshall, in which Mr. Justice Brennan joined.

This case squarely presents the question, not decided in *Agurs,* whether in cases involving deliberate prosecutorial suppression of facts, the defendant should be required to show anything more than that the information would have been "merely material or favorable" to him, as was the consistently applied rule in the Second Circuit prior to this case. We respectfully submit that in order to deter prosecutorial misconduct that standard must be applied to cases of deliberate suppression, and we urge this Court to take this case so as to squarely decide the question.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Second Circuit Court of Appeals.

Dated: October 28, 1976

Respectfully submitted,

EDWARD M. SHAW
Attorney for Petitioner
Charles D. Erb

Appendix A

Opinion of the United States Court of Appeals

for the Second Circuit

FOR THE SECOND CIRCUIT

Nos. 70, 71—September Term, 1976.

(Argued September 3, 1976 Decided October 1, 1976.)

Docket Nos. 76-1143, 76-1178

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES D. ERB and FRANKLIN S. DEBOER,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from judgment of conviction in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *J.*, in which jury found defendant Erb guilty on ten counts of filing false registration statements with the SEC, using the mail for that purpose, and sending false prospectuses. Defendant DeBoer was found guilty on one count of filing a false registration statement.

Affirmed.

EDWARD M. SHAW, New York, N.Y., *for Appellant Erb.*

GARY P. NAFTALIS, New York, N.Y. (Orans, Elsen & Polstein; Leslie A. Lupert, Harold B. Tevelowitz, on the brief), *for Appellant DeBoer.*

JOHN A. LOWE, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York; Frederick T. Davis, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

Charles D. Erb and Franklin S. DeBoer appeal from judgment of conviction in the United States District Court for the Southern District of New York after a two-week trial before Charles L. Brieant, Jr., *J.* The jury found Erb guilty on four counts of filing false registration statements with the Securities and Exchange Commission (SEC) in connection with the public offering of the common stock of Xprint Corporation (Xprint), and DeBoer guilty on one of those counts. 15 U.S.C. § 77x, 18 U.S.C. § 2. In each instance, the false statement was that an alleged nominee rather than the defendant was the owner of shares of Xprint. The jury also found Erb guilty on one count of causing letters to be mailed on the same subject in furtherance of a scheme to defraud, 18 U.S.C. §§ 1341, 2, and on four counts of causing the transmission of prospectuses containing false statements on the same subject. 15 U.S.C. §§ 77e(b), 77j.[1] Judge Brieant sentenced Erb to concurrent terms of 18 months in prison followed

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1 The jury also acquitted DeBoer on nine counts in which he was jointly charged with Erb, and three counts of violating 18 U.S.C. §§ 1001, 2. The judge dismissed one conspiracy count and two mail fraud counts against both defendants at the end of the Government's direct case.

by 31 months on probation. The judge fined DeBoer $5,000 and imposed a prison term of five months, followed by 31 months of probation. Both Erb and DeBoer appeal, making a variety of contentions. For reasons set forth below, we affirm.

I. The Facts

The relevant facts, as the jury could have found them, are not very complicated, although the case is unusual in one respect. The false statements here, unlike those charged in most indictments involving securities fraud, were not meant to hide the true value of the Xprint stock being offered to the public. Rather, for reasons explained below, the false statements were designed to conceal the status of defendants as selling stockholders. Both defendants, along with George Van Aken, an unindicted accomplice and chief government witness, were partners in a New York Stock Exchange member firm, Baerwald & DeBoer. In April 1969, Erb and Van Aken agreed with Xprint to make a private placement of its stock in exchange for unregistered shares of Xprint common stock to be sold for a nominal sum. On April 22, Erb and Van Aken approached DeBoer about the private placement, and he too purchased shares at a substantially reduced price. By that time, however, Baerwald & DeBoer had also agreed to be Xprint's underwriter in a public offering. DeBoer pointed out that, as partners in the firm, if they registered their Xprint stock in their own names, they would run afoul of regulations of the SEC and the National Association of Securities Dealers (NASD), which barred excessive underwriters' compensation. DeBoer, therefore, wanted his stock registered in the name of James Lovelett, his nominee. Erb and Van Aken subsequently decided to use Dr. Scott Skillern and Donald Sedgwick, respectively, as their nominees, and they confirmed

their decision in a May meeting with various representatives from Xprint.

The partners were then faced with SEC and NASD filing requirements. In June 1969, Baerwald & DeBoer received formal "investment letters" to be signed by Lovelett and Skillern. Van Aken gave the Lovelett letter to DeBoer who returned it with the necessary signature, and Erb forwarded his letter to Skillern. On August 20, 1969, the registration statement, falsely listing Lovelett as a selling shareholder and Skillern as owner of 50,000 shares, was filed with the SEC. Six weeks later DeBoer resigned from the firm.

While all of the criminal charges against the defendants were based on their false statements filed in 1969, they did conduct other transactions in Xprint stock. In January 1970, the Xprint public offering was cancelled because it was never completely sold to the public. Despite this, Erb managed to make a public market for the stock at prices in excess of the public offering price. DeBoer was one of the purchasers of Xprint stock in this "aftermarket."

II. Contentions of Erb

Tape recordings of conversations

On appeal, Erb presses most strongly a number of arguments growing out of the receipt in evidence of three tape recorded conversations between Erb and his nominee, Skillern, in late 1969. Skillern testified that he recorded the conversations with Erb's permission "for a matter of record keeping" since "we are talking about such big money." The conversations were indeed replete with large numbers and references to complicated stock transactions, some of them suggestive of the use of Skillern's heavy losses for Erb's tax benefit. Erb maintains that this evidence denied him a fair trial because the conversations

were irrelevant and "a classic example of inadmissible proof of other crimes," [2] because the prosecutor in his summation was thus able to accuse Erb of trying to "cheat on taxes" and because the prosecutor violated *Brady* v. *Maryland,* 373 U.S. 83 (1963), when he deliberately withheld from the defense Skillern's pre-trial denial of any intent to participate in a tax evasion scheme. These assertions were also the basis of a motion for a new trial in the district court, which Judge Brieant denied.[3]

Taking these contentions in order, the claim of irrelevance is completely without merit. Whether Skillern was Erb's nominee for holding 30,000 shares of Xprint stock and whether Erb knowingly and wilfully misrepresented such ownership to the SEC and the NASD were vital factual issues. Skillern did testify that he was only Erb's nominee, but the taped conversations also bore directly on the relationship between the two and the reasons for it. Erb concedes that Skillern's several references to 20,000 shares of Xprint, coupled with Erb's apparent agreement, supported the Government's theory that Erb knew that Skillern only owned 20,000 out of the 50,000 Xprint shares attributed to him in the prospectus. But, appellant argues, the judge erred in not excluding the remainder of the conversations. We do not agree. The entire conversation in each instance showed that Erb's use of Skillern was part of an overall pattern of conduct and similar acts. The cryptic references to other schemes were not so inflammatory that the likelihood of prejudice outweighed the probative value of the conversation. *United States* v. *Papadakis,* 510 F.2d 287, 294-95 (2d Cir.), cert. denied,

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2 Brief of Appellant Erb at 26.

3 Memorandum opinion, Dkt. No. 74 Crim. 818 (Feb. 10, 1976).

421 U.S. 950 (1975); *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972).

Similarly, the prosecutor's comment in summation that in their discussions Erb and Skillern were "trying to cheat on taxes" did not deny Erb a fair trial. The trial judge immediately instructed the jury to "disregard the argument made."[4] This sufficiently limited the effect of what even appellant refers to as a "one-liner."[5] The judge's comment also effectively disposes of the *Brady* claim. If possible tax evasion was sufficiently irrelevant to rebuke the prosecutor for mentioning it, Skillern's alleged denial of the charge was equally so.

Motion for new trial based upon alleged suppression of evidence

Erb also argues that the district court improperly denied a hearing on his contention that the Government suppressed evidence favorable to him. The Government claimed that appellant had attended a meeting in May 1969 in the office of another investor, Conrad Schmitt. The meeting was important because the evidence showed that on that occasion Paul DeCoster, Xprint's attorney, gave specific advice that Van Aken's or Erb's ownership of Xprint shares would violate the excess compensation rules. At trial, accomplice Van Aken placed Erb at the meeting, and the obviously more credible DeCoster and Earl Deimund, president of Xprint, corroborated this testimony. DeCoster said that "I believe that Mr. Erb was present, although I cannot swear to that." He amended this a

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4 Ladies and gentlemen of the jury, nobody is on trial here for trying to cheat on their taxes. Confine your consideration of this case to the specific open charges in the indictment, and disregard the argument made.

5 Brief of Appellant Erb at 28.

moment later to say that "[m]y best recollection, Your Honor, is that he was present, but I cannot swear to it with a certainty that I have as to other people." Deimund testified that:

> So we held a meeting in Mr. Schmitt's office and Mr. DeCoster and myself told Mr. Schmitt and Mr. Van Aken, Mr. Erb, that the original concept of them owning stock would not be feasible and that if we were to do anything with Baerwald and DeBoer they could not own any of the stock themselves.

In summation, both sides argued as to whether Erb was at this meeting. Erb's counsel stressed the paucity of credible evidence on the issue and the prosecutor emphasized that Van Aken's suspect testimony and DeCoster's less than complete assurance were buttressed by Deimund's testimony.

In the district court, Erb moved for a new trial on the grounds of newly discovered evidence and violation by the Government of its obligation under *Brady* v. *Maryland*, *supra*. Erb asserted that before trial the Government knew that Deimund had always believed it was unlikely ("30% probable") that Erb was at the May meeting and that Schmitt had stated to a prosecutor that he never met with Erb about Xprint. The motion was supported by affidavits of Deimund and Schmitt and accompanied by Erb's affidavit denying his presence at the meeting and his diary showing no reference to such a meeting. In a memorandum opinion,[6] Judge Brieant denied the motion without a hearing. In this court, appellant presses the claim under *Brady*, asserting that at the very least he was entitled to an evidentiary hearing.

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6 See note 3 supra.

We do not agree. Assuming the facts to be as Erb alleged,[7] there was no "suppression" of evidence within the meaning of *Brady*. Erb was "on notice of the basic facts which could have produced . . . alleged exculpatory testimony." *United States* v. *Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Erb obviously knew whether or not he was present at the meeting. He also knew that Schmitt was a potential witness, whose testimony Erb could have procured but did not. Deimund did testify as a government witness and could have been closely cross-examined as to prior statements and his recollection of the meeting, but counsel chose not to do so. Finally, we agree with the district judge that neither Schmitt's nor Deimund's alleged statement "could have been developed so as to have avoided a conviction." Erb's presence at the meeting was evidence only of his motive for making the false statement regarding ownership of Xprint stock. But, as Judge Brieant pointed out:

> [T]he criminal acts here charged do not involve the violation of a rule of the NASD. The acts here charged stem from the knowing and wilfull making of false statements in registration statements and prospectuses filed with the SEC, and the use of the mails to accomplish a fraud. If knowingly and wilfully done, it is irrelevant whether the false statements were made to avert detection by the NASD or for any other purpose, or no purpose. Proof as to the May 12th meeting bore upon the defendant's motive and his knowledge of the law. Ignorance of the law would have been no excuse for its violation. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). If Erb had never been informed of the exis-

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7 In the district court, the Government denied having the information attributed to it by Deimund or Schmitt.

> tence of the NASD rules, which we doubt, since he was a partner in a firm of underwriters, he would still be guilty of these charges if he knowingly and wilfully made these false statements.

Under the circumstances, the "omitted evidence" does not justify a new trial. See *United States* v. *Agurs*, 44 U.S.L.W. 5013, 5017 (U.S. June 24, 1976).

Erb also argues that the trial judge committed error in charging the jury regarding allowable inferences from the failure of Donald Sedgwick to testify. At trial, Van Aken testified that Sedgwick was his nominee. When interviewed before trial by defense counsel, however, Sedgwick apparently had denied that he was merely a nominee and had said "he considered himself to be the owner of the securities." Nevertheless, neither defendant called Sedgwick to testify, although he was available. The Government also did not call Sedgwick as a witness. In summation, DeBoer's counsel argued that the Government's failure to call Sedgwick suggested that he would not corroborate Van Aken, the Government's chief witness. Erb made no such argument. Neither Erb nor DeBoer requested a charge regarding the failure to call Sedgwick.

Judge Brieant charged as follows:

> Now, there is no duty on the part of the government to call in other or additional witnesses whose testimony would merely be cumulative. You are to decide this case on the evidence which is before you or upon the absence of evidence, but not upon evidence which might have been brought before you. Specifically, the government had no duty to call Donald Sedgwick as a witness. As I explained to you earlier, defendants have no duty to call any witnesses or bring any evidence. However, Donald Sedgwick is equally

> available to both sides, and could be subpoenaed by the government or by any defendant if either of them thought they should do so and, accordingly, no inference follows adverse to anyone from the failure to call him as a witness and no such inference adverse to any side in this litigation follows from a failure to bring in testimony which the jury would regard as merely cumulative.

After the charge, DeBoer's counsel took exception to the judge's instruction to the jury

> that they could not draw any inference in the government's failure to call him [Sedgwick] because he was merely cumulative.

Asserting that Sedgwick would have contradicted Van Aken as to the alleged nominee status, counsel objected that Sedgwick was not a "cumulative" witness. The following interchange then occurred.

> The Court: He's cumulative in that he was there at the same time and place and participated in the same conversations that other witnesses testified to. His version can be different and he can still be cumulative.
>
> Mr. Naftalis [Counsel for DeBoer]: Except it seems to me my understanding of the law on uncalled witnesses by the government is that it is the jury's function to make a judgment whether or not he is cumulative or not.
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> The Court: I told them that, that you find—cumulative is the word I used. I decline to modify my instruction as to cumulative witnesses. . . .[8]

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8 The judge at this point also attributed the objection to Erb's counsel, thus preserving the point on appeal for both defendants.

Erb argues in this court that the judge erred in charging that Sedgwick was a "cumulative" witness from whose absence the jury could draw no inference against the Government. Erb also contends that the judge was mistaken in telling the jury that no inference could be drawn because Sedgwick was equally available to both sides.

Turning to the latter objection first, Erb is correct that the weight of authority in this circuit and "[t]he more logical view is that the failure to produce [a witness equally available to both sides] is *open* to an inference *against both parties.*" Wigmore, On Evidence § 288 (3d ed. 1940) (emphasis in original); *United States* v. *Dixon,* 536 F.2d 1388, 1394 (2d Cir. 1976); *United States* v. *Crisona,* 416 F.2d 107, 118 (2d Cir. 1969); *United States* v. *Llamas,* 280 F.2d 392 (2d Cir. 1960); *United States* v. *Beekman,* 155 F.2d 580, 584 (2d Cir. 1946); *United States* v. *Cotter,* 60 F.2d 689, 692 (2d Cir. 1932). Cf. *United States* v. *Brown,* 511 F.2d 920, 925 (2d Cir. 1975); *United States* v. *Super,* 492 F.2d 319, 323 (2d Cir.), cert. denied, 419 U.S. 876 (1974) (no inference when witness is equally unavailable). Yet, there is substantial precedent for the charge Judge Brieant gave that the jury may not draw an inference if the witness is equally available. *United States* v. *Miranda,* 526 F.2d 1319, 1331 (2d Cir. 1975); *United States* v. *Dangiolillo,* 340 F.2d 453, 457 (2d Cir. 1965); *United States* v. *Antonelli Fireworks Co.,* 155 F.2d 631, 638-39 (2d Cir.), cert. denied, 329 U.S. 742 (1946). It would, of course, be easier for district court judges to follow one clear signal from this court. But the differing views in the decisions cited above do not on further examination seem as startling as at first glance. We have been unable to find any opinion in this circuit that reversed a conviction because the judge instructed the jury to draw no inference from the

absence of an equally available witness.[9] We believe that this reflects a well deserved reluctance to remove the issue from the sound discretion of the trial judge. Eminent authority suggests caution in developing "elaborate rules of law defining the circumstances when the right [to a missing witness charge] exists." McCormick, On Evidence § 272, at 657-59 (2d ed. 1972). Similarly, if a missing witness charge is given, the jury must be told that it is free to refuse to draw the inference.[10] We adhere to the view that the failure to produce an equally available witness is open to an inference against both parties, but we would be loath indeed to reverse a conviction because the judge told the jury that the inference on the facts before it could not be drawn.

With these considerations in mind, we turn to what occurred here. The claim that the judge erred in not following our general rule was not called to his attention and for that reason alone we would decline to consider it. On the issue whether Sedgwick's testimony would be cumulative—the point that was made in the trial court—the judge apparently did regard it as such.[11] But there is more than the usual aura of gamesmanship in the arguments to us on this issue. The defense had interviewed Sedgwick and presumably would have offered his testimony if it could have been helpful. For reasons of their own, defendants chose not to do so, thus avoiding any possible damaging

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9 Cf. *United States* v. *Jackson*, 257 F.2d 41 (3d Cir. 1958), in which an alternate basis of reversal was the trial court's refusal to allow counsel to argue that the jury should draw an inference from a missing witness.

10 *United States* v. *Crisona*, 416 F.2d 107, 118 (2d Cir. 1969).

11 This view was erroneous. Van Aken's credibility was a sharply disputed issue of fact. If Sedgwick's testimony contradicted Van Aken's, it was not cumulative. See *Burgess* v. *United States*, 440 F.2d 226, 232 (D.C. Cir. 1970); McCormick, supra § 272, at 656-57 n. 26.

effect from presenting Sedgwick as a witness while at the same time attempting to get the benefit of an inference from his absence. Erb did not think enough of the issue to argue it to the jury or to request an instruction, even after the judge had charged the jury.[12] In addition, Van Aken's testimony was subjected to intense cross-examination and impeachment. This, rather than any possible inference from the absence of a witness, on this record, would have influenced the jury to reject Van Aken's story. Under all the circumstances, we are not disposed to reverse Erb's conviction on this ground.

III. Contentions of DeBoer

We turn now to the arguments of appellant DeBoer. Although charged in each of the 16 counts in the indictment, DeBoer was acquitted on all but one count of aiding and abetting the making of a false statement in the registration statement filed by Xprint with the SEC on August 20, 1969. As indicated, the false statement was that James Lovelett, rather than DeBoer, was the owner of 5,000 shares of Xprint's common stock, 2,500 of which were being registered for sale as part of a proposed public offering of 114,375 shares. DeBoer first argues to us that his conviction on the charge cannot stand because "there was no evidence connecting DeBoer to this specific document." [13] DeBoer, in effect, concedes that there was sufficient evidence to show that Lovelett was DeBoer's nominee and that the registration statement was false in this respect. Rather, the argument is that because DeBoer did not directly participate in the preparation of the August 20 statement, did not sign it and did not file it, he may

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12 We are aware that the judge gave Erb the procedural benefit of joining in DeBoer's objection after it was made.

13 Brief of Appellant DeBoer at 16 (emphasis omitted).

not be held responsible for it. The argument is without merit. If DeBoer knowingly assisted in the preparation and filing of a false registration statement, he can be held criminally liable for violating 15 U.S.C. § 77x because of 18 U.S.C. § 2.[14]

Viewing the evidence, as we must, in the light most favorable to the Government, the jury could properly have believed the following: At the April 22, 1969 meeting, Erb and Van Aken offered DeBoer the chance to buy unregistered shares of Xprint at the private offering price of two dollars per share and assured him that Baerwald & DeBoer had already agreed to underwrite a public offering at seven or eight dollars per share. They also told DeBoer that one-half of DeBoer's purchase would be registered and sold in the initial public offering and DeBoer commented that this meant that he "could get more than his investment out the first shot go around." DeBoer was then managing partner of the firm. He explained to the others that, as partners of the underwriter, they could not have stock in their own names without violating the NASD and SEC rules. DeBoer instructed his partners to issue his stock in the name of James Lovelett to avoid disclosing his ownership. DeBoer knew that any public offering would require a registration statement, that it would be false and that the filing was necessary for him to realize a profit. Indeed, in the following month, DeBoer asked Van Aken "where is my stock that I paid $10,000 for?" although he knew the stock was to

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14 This section provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

be in Lovelett's name. All of this was enough to connect DeBoer with the later false filing even though he never saw the document filed, and to support a finding that DeBoer aided and abetted the false filing. See *United States* v. *Wolfson*, 437 F.2d 862, 878 (2d Cir. 1970); *United States* v. *Markee*, 425 F.2d 1043 (9th Cir.), cert. denied, 400 U.S. 847 (1970); *United States* v. *Eskow*, 422 F.2d 1060 (2d Cir.), cert. denied, 398 U.S. 959 (1970).[15]

DeBoer also contends that the applicable five-year statute of limitations, 18 U.S.C. § 3282, barred his conviction. The indictment was filed on August 19, 1974, one day less than five years after the filing of the false registration statement on August 20, 1969. DeBoer argues that because his acts of aiding and abetting occurred a few months before, the statute of limitations bars his conviction. The argument is a novel one, but we do not agree with it. The period of limitation began to run only when the crime was "complete." *Pendergast* v. *United States*, 317 U.S. 412, 418 (1943); see also *Toussie* v. *United States*, 397 U.S. 112, 115 (1970). The crime that DeBoer aided and abetted was not complete or committed until the false statement was filed. DeBoer's premise is that aiding and abetting is a crime separate from the substantive offense abetted. This is not so. 18 U.S.C. § 2 "does not define a crime; . . . there can be no violation of [Section 2] alone; an indictment under that section must be accompanied by an indictment for a substantive offense." *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970). Proof that the substantive offense has been committed is necessary to convict an aider and abettor. *United States* v. *Cades*, 495 F.2d 1166 (3d Cir. 1974). There was no "completed" crime of aiding and

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15 DeBoer relies upon *United States* v. *Koenig*, 388 F. Supp. 670 (S.D.N.Y. 1974), but in that non-jury case the judge found that there were neither material misrepresentations nor a scheme to defraud.

abetting prior to August 20, 1969. Therefore, the statute of limitations was not a bar to DeBoer's conviction on this count.

Finally, DeBoer asserts that the judge erred in his charge in three respects. First, in defining aiding and abetting the judge refused to charge that mere knowledge that a crime is being committed is not enough to make one an aider and abettor. The refusal of similar requests caused reversals in *United States* v. *Terrell,* 474 F.2d 872, 876 (2d Cir. 1973), and in *United States* v. *Gargiulo,* 310 F.2d 249, 254 (2d Cir. 1962). The panels in those opinions emphasized the closeness of the case and the particular facts before them, which indicated that the particular defendant was arguably a mere spectator. That was not the situation here. Van Aken's testimony, which established DeBoer's participation in the scheme, also placed him as the person who first conceived of the plan to deceive the SEC and NASD. See *United States* v. *Finkelstein,* 526 F.2d 517, 526 (2d Cir. 1975). Judge Brieant did emphasize, in language not used at least in *Gargiulo,* supra, 310 F.2d at 254 n.1, that the jury had to find that

> a defendant in some way associates himself with the criminal venture, that he participates in it, as in something he wishes to bring about, or needs, that he seeks by his action to make the criminal efforts of the person who is being aided and abetted succeed.

Under the circumstances, we do not believe that the jury was misled or that the failure to charge the requested language justifies our reversing DeBoer's conviction. However, when the issue of aiding and abetting is submitted to the jury, we see no persuasive reason why a judge should not include the thought that mere knowledge that the crime is being committed is not sufficient to convict a defendant.

We trust that district court judges in this circuit will do so in the future, although, as this opinion indicates, failure to have done so in the past will not necessarily result in reversal.

DeBoer also claims that the judge erred in charging that the defendant "is presumed to intend the natural and probable or ordinary consequences of his acts." We have strongly criticized a similar instruction in the past as possibly appearing to shift the burden of proof to the defendant. *United States* v. *Barash,* 365 F.2d 395 (2d Cir. 1966), cert. denied, 396 U.S. 832 (1969); see also *United States* v. *Wilkinson,* 460 F.2d 725 (5th Cir. 1972). We have also expressed surprise at the continued appearance of this language in charges. *United States* v. *Bertolotti,* 529 F.2d 149, 159 (2d Cir. 1975). Nevertheless, DeBoer made no objection in the trial court. Moreover, as we have just emphasized, the judge did tell the jurors that they had to find that DeBoer associated himself with the false filing as "something he wishes to bring about." Under the circumstances, we decline to find plain error under Fed. R. Crim. P. 52(b). *United States* v. *Scandifia,* 390 F.2d 244, 248 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969); *United States* v. *Umans,* 368 F.2d 725, 728 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967).

Finally, DeBoer argues that the court's instruction on the failure to call Donald Sedgwick as a witness was error. We have already discussed this issue in the context of Erb's appeal. Although DeBoer, unlike Erb, did raise this objection with the trial judge and did argue to the jury on Sedgwick's absence, for the reasons previously given, we are not inclined to reverse on this issue.

Accordingly, the judgments of conviction are affirmed.

Appendix B

Excerpts of Memorandum and Order

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-v-

74 Crim 818-CLB

CHARLES D. ERB and FRANKLIN DE BOER,

Defendants.

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Brieant, J.

Defendant Erb moved, pursuant to Rule 33, F.R.Crim.P., for an order granting a new trial upon the grounds that: (1) the Court admitted into evidence erroneously certain prejudicial tape recordings; (2) the prosecutor in his summation to the jury made an improper comment regarding this evidence; (3) the Government breached its obligations of disclosure under Brady v. Maryland, 373 U.S. 83 (1963); and (4) there is newly discovered evidence. Defendant DeBoer also moved for a new trial upon the information brought forward by Erb, although he raises separate grounds for his motion.

Erb was convicted on four counts of violating 15 U. S.C. §77x involving the filing of false registration statements of the common stock of Xprint Corporation; two counts of mail

fraud; and four counts of using the mails to transmit a pro- 2b
spectus as to which no proper registration statement had been filed, in violation of 15 U.S.C. §§77e(b) and 77j. De Boer was convicted on one count of having violated 15 U.S.C. §77x.

I

* * *

II

VanAken testified that he and Erb attended a meeting on May 12, 1969 with Deimund and DeCoster in the office of Conrad Schmitt at Kimberly Capital Corporation. VanAken testified that at the time DeCoster told them that if they took the Xprint shares in their own names they would risk violating the NASD rules governing excessive underwriter's compensation.

DeCoster also testified concerning this meeting. DeCoster testified that it was his best recollection that Erb attended the meeting but then qualified this statement saying that he was less certain that Erb was present than he was that other persons were present. (Trial Tr. p. 546). DeCoster substantially corroborated VanAken's account of the meeting's agenda. DeCoster testified that VanAken told him that he understood the rule limiting underwriter's compensation and

asked that he and Erb be permitted to designate owners for the stock that was to have been sold to them. It was agreed that Erb and VanAken could designate substitute owners. The Court specifically instructed the jury that testimony regarding the May 12th meeting was not binding on Erb unless the jury found that Erb had been present. DeCoster also testified that in the middle of June, 1969, Erb informed him by telephone that his designee would be Skillern. (Trial Tr. p. 550).

Deimund testified that DeCoster apprised him of the problems that might be encountered if Baerwald & DeBoer acted as underwriters for the Xprint offering, and VanAken and Erb owned shares in that corporation. Deimund testified that he and DeCoster told VanAken, Erb and Schmitt that they could not own shares themselves.

After trial, in an affidavit sworn to on November 14, 1975, Deimund stated that in pre-trial interviews with two Assistant United States Attorneys, he told them:

> "that it was logical that Mr. Erb might have been there, but that, although I was sure that VanAken, DeCoster and Schmitt were present, I believed it was only a 30% probability that Mr. Erb was there. I told them further that I had some vague memory that someone may have arrived at the meeting about two hours late, and that

it was possible that this was Mr. Erb."

Deimund claims to have so informed the prosecutor on several occasions.

Conrad Schmitt, who did not appear as a witness at trial, swore to an affidavit afterwards that he attended various meetings concerning Xprint in the Spring of 1969 with VanAken, Deimund and DeCoster. Schmitt further stated that he never had any meetings about Xprint with Erb, and specifically that Erb was not present during the meeting at Kimberly Capital Corporation. Moreover, Schmitt claims that, in an interview prior to trial, he so informed representatives of the United States Attorney's Office.

The Government denies that Deimund or Schmitt made their respective statements in pre-trial interviews and has submitted the affidavits of the Assistant United States Attorneys involved, as well as the affidavits of two staff members of the Securities and Exchange Commission who assisted in the investigation. For purposes of this motion, however, the Court assumes that these statements were made.

The factual issue at trial was whether Erb was present at the meeting of May 12, 1969. VanAken testified that Erb was there and DeCoster believed that Erb was present. Erb's trial

counsel ably demonstrated that Deimund was not certain in his recollection that Erb had been present. On cross-examination, defense counsel elicited a concession from Deimund that he was having "reasonable difficulty" in recalling specific conversations and the identities of participants in conversations that had occurred in 1969. (Trial Tr. pp. 432-33).

Erb ought to have known whether he had been present at a meeting where he is alleged to have been informed that he may be in violation of the NASD rules. The Government witnesses had placed Schmitt at the meeting in Schmitt's office. Erb elected to exercise his privileges not to testify and not to call Schmitt or any other witnesses in his behalf.

> "The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him." United States v. Ruggiero, 472 F.2d 599, 604 (2d Cir.), cert. denied 412 U.S. 939 (1973). (Emphasis added).

Here, defendant was on notice of the essential fact which would have enabled him to call Schmitt as a witness, or to testify himself. United States v. Ruggiero, supra; United States v. Stewart, 513 F.2d 957 (2d Cir. 1975).

Assuming, solely for the completeness of the argument, that these statements should have been disclosed, a new trial is not warranted. Under the circumstances here presented, the failure to disclose must be viewed as inadvertent, and, therefore

> "a new trial is required only if there is 'a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction'." United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975).

DeCoster, a thoroughly credible witness, testified that his best recollection was that Erb was present at that meeting when compliance with the NASD rule was discussed. Van Aken testified similarly and, although VanAken suffered problems of credibility, the jury could reasonably believe his corroborated testimony. VanAken also testified that he and Erb had previously met with DeBoer in the Spring of 1969 and DeBoer had informed them of potential difficulties with the NASD. (Trial Tr. p. 75). In addition, it was DeCoster's testimony that Erb designated Skillern as his nominee, not at the meeting of May 12, but in a telephone conversation in mid-June. Upon the entire trial record, it does not appear that either

of these statements could have been developed so as to have avoided a conviction.

Moreover, the criminal acts here charged to not involve the violation of a rule of the NASD. The acts here charged stem from the knowing and wilfull making of false statements in registration statements and prospectuses filed with the SEC, and the use of the mails to accomplish a fraud. If knowingly and wilfully done, it is irrelevant whether the false statements were made to avert detection by the NASD or for any other purpose, or no purpose. Proof as to the May 12th meeting bore upon the defendant's motive and his knowledge of the law. Ignorance of the law would have been no excuse for its violation. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). If Erb had never been informed of the existence of the NASD rules, which we doubt, since he was a partner in a firm of underwriters, he would still be guilty of these charges if he knowingly and wilfully made these false statements.

Defendant also contends that he has now obtained newly discovered evidence that demonstrates that he was not in attendance at the May 12th meeting. The evidence which it is alleged is newly discovered is Erb's diary for 1969 which Erb

claims was in the possession of his accountant during trial. The diary shows an appointment unrelated to Xprint crossed out on May 12th. The diary shows no appointments for May 9th. Erb now contends, premised on the absence of any entries in this diary, that he was in California from May 9th through May 12th. In support of this contention, he has submitted the affidavits of two persons then living in the vicinity of Whittier California, who attest that they spent time there with the defendant during the weekend of May 10-11, 1969.

> "To succeed on [a motion for a new trial based on newly discovered evidence] a defendant must show, inter alia, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict." United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975).

In the exercise of reasonable diligence, defendant could be expected to obtain his diary for the time period referred to in this indictment. It is difficult to imagine the circumstances under which the accountant's need for this diary could have exceeded Erb's own need to prepare his defense. There is no suggestion made that these witnesses were not known prior to trial. In the event that they could not testify at

the trial here, their depositions might have been taken in[9b] accordance with Rule 15, F.R.Crim.P. The existence of these alibi witnesses, and the diary could have been discovered prior to trial. United States v. Slutsky, supra; United States v. Fistel, 460 F.2d 157 (2d Cir. 1972).

Assuming that defendant's neglect were to be excused, there is no basis for inferring that had these witnesses testified, a different verdict would have resulted. As discussed earlier, the May 12th meeting while probative of criminal intent was not the crux of the offense. A reasonable juror could conclude that Erb did not attend that meeting and still return a guilty verdict on these charges.

III

* * *

CONCLUSION

The motions are in all respects denied.

So Ordered.

Dated: New York, New York
February 10, 1976

/s/ CHARLES L. BRIEANT
CHARLES L. BRIEANT
U.S.D.J.

Appendix C

Judgment of the United States Court of Appeals

for the Second Circuit

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of October one thousand nine hundred and seventy-six.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge
HON. WILFRED FEINBERG,
HON. ELLSWORTH A. VANGRAAFEILAND,
Circuit Judges,

76-1143
76-1178

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES D. ERB, FRANKLIN S. DEBOER,

Defendants-Appellants.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By
VINCENT A. CARLIN
Chief Deputy Clerk